

ORIGINAL

BEFORE THE

**Federal Communications Commission**

WASHINGTON, DC 20554

RECEIVED

APR 19 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In Re Applications of

LIBERTY CABLE CO., INC.

For Private Operational Fixed  
Microwave Service Authorizations and  
Modifications

New York, New York

- ) WT Docket No. 96-41
- )
- ) File Nos.
- )
- ) 708777 (WNTT370)
- ) 708778, 713296 (WNTM210)
- ) 708779 (WNTM385)
- ) 708780 (WNTT555)
- ) 708781, 709426, 711937 (WNTM212)
- ) 709332 (NEW)
- ) 712203 (WNTW782)
- ) 712218 (WNTY584)
- ) 712219 (WNTY605)
- ) 713295 (WNTX889)
- ) 713300 (NEW)
- ) 717325 (NEW)

DOCKET FILE COPY ORIGINAL

**OPPOSITION TO MOTION TO DELETE ISSUE**

Arthur H. Harding  
R. Bruce Beckner  
Christopher G. Wood  
Kimberly A. Kelly  
Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Washington, D.C. 20036  
(202) 939-7900

Attorneys for  
TIME WARNER CABLE OF NEW YORK CITY  
and  
PARAGON CABLE MANHATTAN

Dated: April 19, 1996

No. of Copies rec'd  
List ABCDE

026

## TABLE OF CONTENTS

SUMMARY .....	i
PRELIMINARY STATEMENT .....	2
FACTUAL BACKGROUND .....	3
ARGUMENT .....	5
I.    The Commission's Hearing Designation Order Already Has Considered The Purported Unavailability To Liberty Of A Cable Franchise And The Fact That, Under The 1996 Telecommunications Act, Liberty/ Bartholdi's "Non-Common Systems" Are Not "Cable Systems" For Which A Franchise Is Required .....	5
II.   A Federal Court Has Found That Liberty's "Efforts" To Obtain A Cable Franchise Began Only After It Was Required To Do So By The City Of New York .....	7
III.  Bartholdi's Motion To Delete Fails To Mention, Much Less Address, Its August-September 1995 Extension Of Unfranchised Coaxial Cable Facilities To The "Europa" At 22 West 66th Street In Manhattan .....	12
IV.  Liberty/Bartholdi Is Collaterally Estopped From Arguing That The Lack Of An Application Procedure Was The Reason It Did Not Have The Required Cable Franchise .....	14
CONCLUSION .....	18

### Summary

Liberty Cable's Motion to Delete Issue is both procedurally deficient and substantively incorrect. In its untimely motion, Liberty asks the Administrative Law Judge to remove from the Commission's March 5, 1996 Hearing Designation Order the issue of its unauthorized operation of a cable system. Liberty contends that at the time of its application, there was no procedure or mechanism under New York City law through which it could obtain a cable television franchise. This argument, however has already been considered by the Commission and found unavailing. The Commission's Hearing Designation Order acknowledged findings from earlier proceedings in which these same representations were made and concluded that further investigation was necessary. Liberty's argument also fails because a federal district court specifically found that Liberty's failure to obtain a cable franchise was not caused by the lack of an application procedure but by Liberty's dilatory behavior. Moreover, this district court determination necessarily precludes Liberty from making such an argument here. Lastly, the Motion to Delete fails even to mention the findings of a New York administrative agency that Liberty was not candid with the Commission in connection with its extension of unfranchised cable facilities to an apartment building in New York City in August-September 1995.

For the foregoing reasons, Liberty's Motion to Delete Issue must be denied.

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, DC 20554

DOCKET FILE COPY ORIGINAL

In Re Applications of	) WT Docket No. 96-41
	)
LIBERTY CABLE CO., INC.	) File Nos.
	)
	) 708777 (WNTT370)
For Private Operational Fixed	) 708778, 713296 (WNTM210)
Microwave Service Authorizations and	) 708779 (WNTM385)
Modifications	) 708780 (WNTT555)
	) 708781, 709426, 711937 (WNTM212)
New York, New York	) 709332 (NEW)
	) 712203 (WNTW782)
	) 712218 (WNTY584)
	) 712219 (WNTY605)
	) 713295 (WNTX889)
	) 713300 (NEW)
	) 717325 (NEW)

**OPPOSITION TO MOTION TO DELETE ISSUE**

Time Warner Cable of New York City and Paragon Cable Manhattan (collectively, "TWCNYC") hereby oppose the "Motion to Delete Issue Pursuant to 47 C.F.R. § 1.229" filed by Bartholdi Cable Co., Inc. (hereinafter referred to as the "Motion to Delete") on April 9, 1996.<sup>1</sup>

---

<sup>1</sup>The Motion to Delete, although served by fax at approximately 6:45 p.m. on April 8, was not filed with the Secretary of the Commission prior to the 5:30 p.m. closing of that office. Accordingly, it is deemed to have been *filed* the next day, April 9. 47 C.F.R. § 1.4(f). That circumstance also makes the motion untimely, since it is more than 15 days after the date of the Federal Register publication of the *HDO* (March 22, 1996). See 47 C.F.R. § 1.229(a); 61 Fed. Reg. 11839.

Preliminary Statement

Bartholdi Cable Company ("Bartholdi"), previously known as Liberty Cable Company, used coaxial cable interconnections to provide its video programming service to buildings in New York City that were not commonly owned, wherever it was commercially advantageous to do so. Not having a franchise from New York City to provide cable television service, this action violated the 1984 Cable Act and New York state law. As a result of this misconduct, the Hearing Designation Order ("*HDO*") has designated issues both as to whether or not Liberty/Bartholdi is eligible to hold OFS microwave licenses and as to whether it misrepresented facts or lacked candor with the Commission by failing to advise the Commission in its OFS applications of the fact of these unfranchised cable connections. Bartholdi now seeks to have these issues removed because, assertedly, "no [cable] franchise was available for Liberty to obtain." Motion to Delete at 2.

There are at least three reasons why Bartholdi's Motion to Delete should be denied. First, in the Hearing Designation Order itself, the Commission considered the very circumstances that Bartholdi now raises in defense of its actions -- and decided that a hearing into those facts and circumstances was necessary. Thus, Bartholdi re-argues matters that the Commission has already decided -- and which are beyond the power of the Administrative Law Judge to reconsider. Second, Liberty's Motion to Delete is, in reality a motion for partial summary decision, in that it attempts to have certain of the issues specified in the Hearing Designation Order resolved in its favor prior to hearing, or even to the initiation of discovery. Bartholdi's Motion to Delete assumes that there are no contested factual matters relevant to its defense that it took all reasonable steps to obtain a cable franchise and did not

have clear notice of the franchise requirement. However, as this Opposition will make clear, many of Bartholdi's factual claims are contrary to the findings of other tribunals in proceedings to which Liberty and TWCNYC were parties. Bartholdi should be precluded from re-litigating those issues here. Moreover, an implicit premise of the *HDO* is that the "facts and circumstances" surrounding Liberty's unfranchised use of coaxial cable interconnections are *not* clear and should be the subject of a hearing. Third, the Motion to Delete should be denied because it is based on an incorrect legal premise -- that the asserted "unavailability" of a cable television franchise from New York City excuses not only Liberty's operation of unfranchised cable television facilities in that City but also excuses its misrepresentation of itself to the Commission as an "SMATV" operator. In reality, it was a cable operator as defined by the Communications Act, albeit one without a franchise. Finally, the Motion to Delete does not even address the issue specified in the Hearing Designation Order as to whether, as an unfranchised cable operator, Liberty/Bartholdi is (or was) even eligible to hold OFS licenses from the Commission.

#### Factual Background

Noting that "under former Section 522(7)(B) of the Communications Act as amended by the 1984 Cable Act, the interconnections between 12 pairs of non-commonly owned, managed or controlled buildings appeared to qualify Liberty as a 'cable operator' even though the interconnections did not make use of any public right of way," the Commission held that "Liberty's apparent violations of the Communications Act prohibition on operating a cable system without a franchise, along with its failure to disclose these apparent violations in the pending applications to the extent required by Section 1.65 of the Rules, raise

substantial and material questions concerning Liberty's qualifications to be a Commission licensee." Hearing Designation Order in WT Docket No. 96-41, FCC 96-85 (rel. March 5, 1996) at ¶ 14.

Although the Hearing Designation Order states that the issues were designated to determine the "facts and circumstances surrounding Liberty's hardwiring of interconnected, non-commonly owned buildings without first obtaining a cable franchise," Bartholdi now invites the Administrative Law Judge to delete those issues from the case. Bartholdi's Motion to Delete appears to suggest that its purported attempts to apply for a cable franchise from New York City and its unsuccessful constitutional challenges to the franchising requirements of both New York and federal law make it "manifestly unjust" to pursue remedies against Bartholdi in this proceeding. Motion to Delete at 16. Significantly, Bartholdi admitted that it "constructed its Non-Common Systems [for which a cable franchise was required by federal and state law] primarily during the period from the end of 1992 to Fall 1994."<sup>2</sup> Motion to Delete at 9, footnote omitted. Thus, the only factual questions left are, as the Hearing Designation Order specifies, the "facts and circumstances" surrounding

---

<sup>2</sup>Even now, Liberty/Bartholdi has not been completely candid with the Commission. Although the Motion to Delete acknowledges construction of a "non-common system" in February 1995, Liberty/Bartholdi fails to acknowledge the construction of another "non-common system" at 22 West 66th Street in Manhattan (a building known as the "Europa") sometime between the middle of August and the middle of September 1995. This action was taken only weeks after Liberty had told the FCC that it would not add to its "non-common systems" and nearly a year after its Motion to Delete suggested that Liberty's practice of making such illegal cable interconnections had ended. Only after the New York State Commission on Cable Television ("NYSCCT") issued, first a cease-and-desist and then a forfeiture order based on Liberty's activities at the Europa, characterizing Liberty as "an incorrigible telecommunications scofflaw" did Liberty replace the illegal coaxial cable connection with an open transmission path that did not require a cable franchise. See pp. 12-14, infra.

the construction of these illegal connections. Bartholdi's attempt to avoid the inquiry mandated by the Hearing Designation Order should be denied.

### Argument

- I. The Commission's Hearing Designation Order Already Has Considered The Purported Unavailability To Liberty Of A Cable Franchise And The Fact That, Under The 1996 Telecommunications Act, Liberty/ Bartholdi's "Non-Common Systems" Are Not "Cable Systems" For Which A Franchise Is Required.

Bartholdi's "Motion to Delete" suggests that because (1) there was "considerable legal uncertainty" about whether or not it was required to have a franchise, (2) "no franchise application procedures existed for private SMATV operators" and (3) "the legal landscape has . . . shifted so that Liberty's obligation to apply for a franchise has now been definitively obviated," the issues designated by the *HDO* relating to its unfranchised operation of cable interconnections between buildings of different ownership should be deleted from this proceeding. Motion to Delete at 4. In fact, the *HDO* itself indicates that the Commission considered all these factors and, nevertheless, mandated that there be a hearing on the "facts and circumstances" of Liberty's use of cable interconnections without a franchise to do so.

First, the *HDO* acknowledges the existence of the judicial decision (Liberty Cable Company v. City of New York) in which Liberty first raised the argument that a cable television franchise was unavailable from the New York City and that "legal uncertainty" about whether or not it was required to have a franchise for its "non-common systems" excused its failure to have sought one. Hearing Designation Order at ¶ 5, 6.

Secondly, with respect to the asserted "legal uncertainty" about whether or not Liberty was required to have a franchise for its "non-common systems," the *HDO* observed that

[T]he Commission also stated (interpreting the definition in effect during the relevant time period) that if multiple unit dwellings are interconnected to each other by physically closed transmission paths, the systems are cable systems unless the buildings are under common ownership, control or management and do not use public rights of way. Definition of a Cable Television System, 5 FCC Rcd 7638 (1990).

Id. at ¶ 11. Thus, as far as the Commission is concerned, the matter of whether Liberty was obligated to have a franchise for its "non-common systems" was settled beyond peradventure in 1990, much earlier than the actions that are the subject of the *HDO* took place.

Third, the Commission acknowledged that the definition of a cable television system had been changed in the 1996 Telecommunications Act: "Because Liberty apparently does not use any public rights-of-way, the connections between non-commonly owned buildings would no longer classify Liberty as a cable operator." Id. at ¶ 12. Nevertheless, the Commission referred to the fact that these interconnections existed prior to the amendment of the statutory definition as a reason why "a question exists where such unlawful operation has any bearing on Liberty's qualifications to be a Commission licensee." Id. Thus, the Motion to Delete does not bring any new matters to the Administrative Law Judge's attention. The matters that the Motion to Delete does raise clearly were known to the Commission at the time it considered its Hearing Designation Order and, in most cases, were discussed in the *HDO* itself. Notwithstanding these matters, the Commission determined to designate issues for hearing relating to Liberty's operation of coaxial cable interconnections without a franchise. Bartholdi has not offered the Administrative Law Judge a basis for reconsidering

or amending that decision by the Commission, assuming such reconsideration or amendment were possible.<sup>3</sup>

II. A Federal Court Has Found That Liberty's "Efforts" To Obtain A Cable Franchise Began Only After It Was Required To Do So By The City Of New York.

Bartholdi claims to have relied upon a 1992 letter of the New York City Department of Information Technology and Telecommunications ("DOITT") to Russian American Broadcasting Company ("RAB") which advised RAB that it would need a franchise to use coaxial cable interconnections to deliver a single channel of Russian-language video programming to various apartment buildings under non-common ownership. Motion to Delete at 9. Bartholdi argues that, in reliance on this letter, it built coaxial cable connections between non-commonly owned apartment buildings to distribute its multiple channels of video programming obtained from satellite transmissions as well as local television broadcasts. *Id.* Liberty claims, therefore, to have been surprised when, on August 23, 1994, the New York State Commission on Cable Television ("NYSCCT") issued an Order to Show Cause directing Liberty to appear and show cause why it should not be found to be subject to cable television franchising requirements or be directed to remove all wire connections between non commonly-owned buildings. *Id.* at 10. Liberty then claims it attempted to obtain franchises, but there were no procedures to do so.

In reality, the situation, as described by the U.S. District Court in Manhattan in Liberty Cable Co., Inc. v. City of New York, 893 F. Supp. 191 (S.D.N.Y.), aff'd, 60 F.3d 961 (2d Cir. 1995), does not cast Liberty in such a favorable light. First, Bartholdi's

---

<sup>3</sup>See Wireless Telecommunication Bureau's Opposition to Liberty Cable Co., Inc.'s Motion to Delete Issue (April 18, 1996) at ¶ 10.

argument is legally incorrect. RAB's proposal to DOITT that prompted the letter upon which Liberty claims to have relied was simply to provide for the retransmission by wire of an existing local television broadcast signal. Liberty Cable Co., 893 F. Supp. 191, 204 n.21. As such, the system proposed by RAB was *not* a "cable system" within the meaning of federal law. See 47 U.S.C. § 522(7)(A) (1995). By contrast, Liberty's systems are multichannel systems that provide signals from a variety of sources, not just local television broadcasts. Moreover, as a matter of New York law, Liberty's reliance on the DOITT letter was unjustified. See Liberty Cable Co., 893 F. Supp. 191, 204 n.22. Significantly, neither here nor in the Liberty Cable Co. case, did Liberty/Bartholdi claim to have applied for a cable franchise (as RAB had) or to have sought written confirmation from DOITT that the agency's letter to RAB had the implication that Liberty chose to place on it.

The district court in Liberty Cable Co. also found that, prior to the August 1995 NYSCCT show cause order, Liberty ignored other clear warnings that it was operating in violation of the law. First, Liberty was a party to the Supreme Court's decision in F.C.C. v. Beach Communications, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2096 (1993) that upheld, against an equal protection challenge, the definition of "cable system" in 47 U.S.C. § 522(7) that included within it cable interconnections between non-commonly owned properties even when those interconnections do not cross or use public rights-of-way. These were exactly the kind of systems that Liberty had built. Liberty Cable Co., 893 F. Supp. at 204-205. Indeed, Liberty had urged the FCC to *defend* the statutory definition that included such systems as "cable systems" needing a franchise. Id. at 205 n.25. Nevertheless, the district court found,

Liberty did not even communicate with the City about a cable franchise until October 1994, *after* the NYSCCT had issued its show cause order. Id. at 205. As Judge Preska wrote,

even then, it was in a single-sentence letter stating only that Liberty was "interested in applying for a cable television franchise pursuant to the Resolution No. 1639 and applicable federal law." [citing to record] Particularly, in light of the *Beach III* decision, there is no satisfactory explanation as to why Liberty did not request a franchise promptly after June 1, 1993.

Id.; footnote omitted.

Similarly, Liberty's alleged "good faith efforts to . . . clarify, through wholly appropriate litigation, applicable legal obligations" do not shine so brightly in the light of the complete record. In fact, these "good faith efforts" were nothing less than an attempt to derail the actions of the NYSCCT to enforce federal and state laws that required Liberty to have a cable television franchise. The sequence of events was as follows:

- \* August 23, 1994 -- NYSCCT issues Order to Show Cause directing Liberty to appear on September 18 and show cause why it should not be found to be a cable system subject to the franchising requirements of New York law or be compelled to remove all of its coaxial cable connections between non-commonly owned apartment buildings. Liberty Cable Company, 893 F. Supp. 191, 197.
- \* At Liberty's request, NYSCCT extends the date for responding to the Show Cause Order to October 19, 1994. Id.
- \* October 18, 1994 -- Liberty requests a second postponement of the response date, for 180 days. The NYSCCT postpones the response date only until November 1. Id. at 197-198.

- \* October 28, 1994 -- Liberty writes DOITT "expressing interest" in applying for a cable franchise. Id. at 198.
- \* October 31, 1994 -- Liberty files its Answer to the Show Cause Order. Id.
- \* December 8, 1994 -- Liberty files a complaint in federal court for declaratory and injunctive relief against New York City, the NYSCCT, and the United States. Id.
- \* December 9, 1994 -- The NYSCCT administrative proceeding begins, and the NYSCCT issues a "Standstill Order" prohibiting Liberty from establishing any new coaxial cable connections between non-commonly owned buildings in New York City and from activating service at any building already connected by a coaxial cable from another building under different ownership where such service had not been activated before. Id.
- \* December 22, 1994 -- Liberty asks for and receives a temporary restraining order from the federal district court (1) prohibiting the defendants from requiring Liberty to stop serving subscribers in buildings served by coaxial cable from another building under different ownership, (2) prohibiting defendants from enforcing the Standstill Order, and (3) prohibiting defendants from requiring Liberty to obtain a cable franchise to continue service to subscribers by means of coaxial cables from non-commonly owned buildings.

By agreement, the temporary restraining order continued through March 10, 1995.<sup>4</sup> Id.

- \* March 13, 1995 -- The federal district court denies Liberty's application for a preliminary injunction with the same provisions as the t.r.o. and dismisses most of the counts of the complaint. Id. at 213, 215.
- \* July 12, 1995 -- The U.S. Court of Appeals affirms the district court's decision. Liberty Cable Company, Inc. v. City of New York, 60 F.3d 961. The opinion rejects the core premise of Liberty's argument here: "Liberty contends that the City may not require franchises for non-common systems without having a licensing procedure for such systems already in place. In the circumstances of this case, we disagree." Id. at 964.

These facts do not support Liberty's argument that the issues surrounding Liberty's use of unfranchised coaxial cable connections should be deleted from this proceeding. Rather, they show that Liberty proceeded to use coaxial cable interconnections between non-commonly owned buildings to provide video programming in knowing violation of the law after June 1993 (when the Supreme Court held that federal law prohibited such activity)<sup>5</sup> and, *until after the NYSCCT took action to enforce those laws*, without making efforts either

---

<sup>4</sup>Liberty/Bartholdi admits taking advantage of the temporary restraining order to build yet another illegal coaxial cable connection. Motion to Delete at 9, n.7.

<sup>5</sup>Liberty's citation of various FCC decisions from the 1980s in support of its argument that there was uncertainty about its legal status is incomplete. See Motion to Delete at 6-7. It overlooks the Commission's 1990 definitional statement, cited in the *HDO* at paragraph 11; and it omits the Supreme Court's 1993 Beach Communications decision, also cited in the *HDO* at paragraph 10.

to comply with the law by obtaining a cable franchise or to seek adjudication of its theories as to why it should not be required to comply with the law. Thereafter, Liberty's efforts were directed at resisting or halting enforcement efforts by the State of New York. These facts do not suggest that Liberty should be excused for not having complied with the law that required it to have a cable television franchise, much less that it be excused for not having informed the Commission about its non-compliance until it was forced to.

III. Bartholdi's Motion To Delete Fails To Mention, Much Less Address, Its August-September 1995 Extension Of Unfranchised Coaxial Cable Facilities To The "Europa" At 22 West 66th Street In Manhattan.

Among the more flagrant instances of Liberty's lack of candor with the Commission about its use of unfranchised coaxial cable interconnections between non-commonly owned buildings that is within the issue that it now asks the Administrative Law Judge to delete are Liberty's statements about use of its OFS receive site at 10 W. 66th Street. On July 12, 1995, it told the Commission that its OFS receive site at 10 W. 66th was, by means of an unfranchised coaxial cable connection, supplying programming to 55 Central Park South. However, Liberty promised that, "These facilities will not be extended by hardwire connection unless and until Liberty is authorized to make such a connection or unless such a connection is otherwise authorized by law."<sup>6</sup>

In a paper dated August 9, 1995, Liberty made an even broader statement of its intentions: "Consistent with the defined meaning of the word, Liberty has no plan to install

---

<sup>6</sup>Liberty Cable Company, Inc. Statement of Eligibility and Use, FCC Form 402 in File No. 708778 at 2 (submitted July 12, 1995).

additional Non-Common interconnections until 'authorized' to do so."<sup>7</sup> Nevertheless, within nine days of the date of this paper filed at the FCC, TWCNYC's work crews were asked to stop installing cable service in the "Europa" at 22 W. 66th Street so that Liberty's workers could make the installation. Upon further investigation by TWCNYC employees, it was determined that Liberty had run a coaxial cable from the adjacent building (10 W. 66th Street) to supply programming to the Europa. The building at 10 W. 66th is not under common ownership, control or management with the Europa, so a cable television franchise was required for this interconnection.

The NYSCCT issued an Order to Show Cause to Liberty regarding this new cable facility on October 26, 1995; and an Order to Cease and Desist, dated November 30, 1995,<sup>8</sup> found that Liberty had established an unfranchised coaxial cable interconnection between 10 West 66th and 22 West 66th (the Europa) in violation of the 1994 Standstill Order as well as of New York and federal law. The NYSCCT held that Liberty, having already admitted the existence of an unfranchised "cable system" between 10 West 66th Street and 55 Central Park South, had, *extended* that system to 22 West 66th, contrary to its representation to the FCC just over one month earlier.

The NYSCCT, having been informed of Liberty's representations of intent to the FCC regarding construction of further coaxial cable connections between non-commonly owned buildings and faced with Liberty's continued disobedience of the November 30 Order

---

<sup>7</sup>Liberty Cable Reply to Opposition to Requests for Special Temporary Authority in File Nos. 708778, 708779, 708781, 709426, and 711937 (dated August 9, 1995) at 8; footnote citing various dictionary definitions of the word "plan" omitted.

<sup>8</sup>A copy of the Order to Cease and Desist is attached as Exhibit A hereto.

to Cease and Desist, imposed forfeitures on Liberty in an Order dated December 13, 1995.

In so doing, the NYSCCT commented: "Liberty is apparently not easily deterred -- neither its being an illegal action, nor a violation of our 'standstill' order, nor a clear breach of a commitment made to the FCC daunted Liberty from doing what it said it wouldn't do: extending these same facilities by hardwire connection, in this instance, to the Europa."

Order Imposing Forfeitures on Liberty Cable if "Cease and Desist" Order is Violated (rel.

December 13, 1995) at 3.<sup>9</sup> In light of these findings by the New York state agency that regulates cable television, it is surprising that Bartholdi failed even to mention the "Europa" in suggesting that the Administrative Law Judge delete the issue relating to Liberty's use of coaxial cable connections without a franchise. This material omission from Bartholdi's Motion to Delete alone is sufficient reason to deny it. This and the adjudicated facts concerning Liberty's actions in extending its pre-existing unfranchised cable facilities to the Europa are clear reasons both to deny the Motion to Delete and to include the facts and circumstances surrounding the filing of the Motion itself within the scope of the designated lack of candor issues.

IV. Liberty/Bartholdi Is Collaterally Estopped From Arguing That The Lack Of An Application Procedure Was The Reason It Did Not Have The Required Cable Franchise.

In its request to delete the portions of the Hearing Designation Order which designate for inquiry Liberty's failure to obtain a cable franchise in accordance with state and federal law, Bartholdi contends principally that DOITT's lack of a franchise application procedure prevented its acquisition of a cable franchise. Motion to Delete at 2. In stark contrast to the

---

<sup>9</sup>A copy of this Order is attached as Exhibit B hereto.

asserted absence of means to obtain a cable franchise from New York City, the district court in Liberty Cable Company, Inc. v. City of New York found that lack of interest rather than lack of a procedure kept Liberty from obtaining its cable franchise. Though Bartholdi would have the Commission believe that it was innocently "shut out" from the franchise process despite "consistent and persistent" attempts, the district court's findings clearly indicate that Liberty's dilatory behavior, and nothing more, prevented a successful effort for a cable franchise.<sup>10</sup>

The district court in Liberty Cable Co., a case in which Liberty and TWCNYC were both parties, fully considered the factual issues surrounding Liberty's unlawful provision of cable service without a franchise, and it resolved them against Liberty. Therefore, Bartholdi is precluded or "collaterally estopped" from advancing the inconsistent factual arguments found in the Motion to Delete.

The doctrine of collateral estoppel is applied when "some question of fact in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies." RKO General, Inc., 48 RR 2d 945, 963 (1980) (citing 1B Moore's Federal Practice, ¶ 0.441[2], at 3777 (2d ed. 1974)). In judicial as well as

---

<sup>10</sup> The appellate court reiterated this conclusion. It observed that soon after Liberty's application for a franchise in October, 1994, the city initiated rulemaking and other necessary procedures to establish regulations and policies for granting cable franchises to provide cable service among non-commonly owned buildings. Liberty Cable Company v. City of New York, 60 F.3d 961, 964. In fact, the court specifically found that "[o]n the present record there is no evidence of unreasonable administrative delay." Id. Presumably, if Liberty had genuinely pursued a franchise for its system in a more timely fashion, it may never have run afoul of city, state and federal cable laws.

administrative proceedings,<sup>11</sup> collateral estoppel bars the reexamination of factual findings and issue determinations in subsequent judicial and administrative actions. 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4475 (1981). In a case which held that an administrative agency correctly precluded reconsideration of factual issues that had been the subject of a district court finding, the five elements of collateral estoppel were established:

- (1) the issue precluded must be identical to one previously litigated;
- (2) the issue must have been actually determined;
- (3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding;
- (4) the prior judgment must be final and valid;
- (5) the party against whom the estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous forum.

Ramsay v. U.S. Immigration & Naturalization Service, 14 F.3d 266, 210 (4th Cir. 1994)

(citations omitted).

The issue of whether Liberty's not having a cable franchise was a problem of its own making or one that was caused by the absence of an application procedure fits the criteria for collateral estoppel. The question presented here is the same as the one presented to the district court in Liberty Cable Co. Whether in support of the subject motion or in its prayer to enjoin enforcement of the City's standstill order, the facts advanced by Liberty/Bartholdi in both situations were for the exclusive purpose of defending its unfranchised use of wires to provide video programming to non-commonly owned buildings. With regard to the second

---

<sup>11</sup> Indeed, the Commission has observed, "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it . . . ." collateral estoppel is applied to "prevent re-litigation of factual disputes . . . ." Imagists, 66 RR 2d 928, 929 (1989) (citing, United States v. Utah Construction and Mining Co., 384 U.S. 394, 422, 86 S.Ct. 1545, 1560 (1966)).

and third criteria, the factual issue was, indeed, actually determined and was a critical part of the Liberty Cable Co. decision. As has been mentioned earlier, Liberty's factual assertions were presented by Liberty through its pleadings, restated and evaluated by the court in its opinion, and, finally, utilized as the source of the court's conclusion that Liberty's lack of diligence, rather than the absence of appropriate procedure, led to its failure to obtain a cable franchise. Moreover, resolution of the factual matter was not only a necessary part of the decision, it was the **essential** part of the decision.


Next, the district court decision is unquestionably final. The decision was appealed to the second circuit and the district court's holding was affirmed. Liberty Cable Company, 60 F.3d 961 (2d Cir. 1995). The Supreme Court denied Liberty's Petition for Writ of Certiorari. 64 U.S.L.W. 3623 (1996).

Invoking the doctrine of collateral estoppel, the Administrative Law Judge should not re-open the factual determinations made by other tribunals. Bartholdi can not be permitted to re-litigate factual determinations that were made by the federal court. The federal courts' decisions in the Liberty Cable Company v. City of New York case contradict the arguments Bartholdi makes here. The Administrative Law Judge should not entertain an argument that the unavailability of a franchise procedure was the reason Liberty had no cable television franchise for the cable interconnection of its non-common systems.

Conclusion

For the foregoing reasons, Time Warner Cable of New York City and Paragon Cable Manhattan respectfully urge the Administrative Law Judge to Deny the Motion to Delete Issues filed by Liberty Cable Company on April 9, 1996.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Arthur H. Harding", is written over a horizontal line.

Arthur H. Harding  
R. Bruce Beckner  
Christopher G. Wood  
Kimberly A. Kelly  
Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Washington, D.C. 20036  
(202) 939-7900

Attorneys for  
TIME WARNER CABLE OF NEW YORK CITY  
and  
PARAGON CABLE MANHATTAN

Dated: April 19, 1996

**EXHIBIT A**



## NEW YORK STATE COMMISSION ON CABLE TELEVISION

In the Matter of

95-760

Petition of Time Warner Cable of New York ) Docket No. 90460  
City and Paragon Cable - Manhattan regarding )  
the operations of Liberty Cable Company, Inc. )

**ORDER TO CEASE AND DESIST***(Released: November 30, 1995)***I. OVERVIEW OF COMMISSION'S ACTIONS**

*Almost a year ago, on December 9, 1994, this Commission issued a "standstill" order against Liberty Cable "requiring that Liberty extend no additional cable or other closed transmission interconnection of buildings not commonly owned, controlled or managed." That such illegal interconnections had already occurred was a fact not in dispute; Liberty acknowledged that seven (7) of its fourteen (14) "hardwired" linkages in New York City connected buildings having no common ownership, management or control.*

*Liberty brought suit in the U. S. District Court to enjoin Commission action. In March 1995, the District Court denied Liberty's motion for a preliminary injunction. In July, the Court of Appeals affirmed the District Court's ruling. Thus, in late August/early September, during which time frame the hardwired interconnection at issue here occurred, this Commission's standstill order was in full force and effect.*

*Not in dispute is the fact that at that time, without any notice to the Commission, a building at 22 West 66th Street was interconnected with a building at 10 West 66th Street utilizing a closed transmission (wire), and that the two buildings shared no common ownership, management or control. The Commission issued on October 26, 1995 a further order to show cause why Liberty's action should not be determined to constitute a violation of its standstill order.*

*Liberty now responds that there is no violation of the standstill order because "Liberty's provision of video programming services to [22 West 66th Street] via the*

*hardwired connection to 10 West 66th Street is authorized by federal statute, regulation and administrative (FCC) precedent". This is so, asserts Liberty, because it has an agreement to sell video programming services to the buildings owner, who in turn sells it to the individual residents. Therefore, Liberty has "no subscribers" and is not, perforce, a "cable system".*

*For the reasons detailed in the discussion below, we find that the argument and analysis advanced by Liberty to be specious and without merit. To accept the essence of Liberty's position here -- that the existence of a functioning "middleman" in the marketing of video services somehow comprises a threshold determination of what is, or is not, a "cable system" -- is to derogate important FCC determinations and guidelines promulgated over many years, and to turn federal statute on its head.*

*Incidentally, while Liberty's response is the subject of extensive legal analysis below, there exists a bothersome circumstance which, in one sense, is almost a transcendent consideration in this matter.*

*We refer to the following: in December 1994, the Commission required Liberty to submit "a listing ... of all hard wire interconnected buildings throughout the five boroughs with an indication of which of these interconnections there is intended to be asserted an exemption because of common ownership, control or management."*

*On the listing subsequently submitted by Liberty (see Appendix A) was the hardwired interconnection of 10 West 66th street to 55 Central Park South. This particular location was not among those cited by Liberty as being "not a 'cable system'" (by reason of having common ownership, management or control or being a hotel transmission). In other words, service between 10 West 66th Street and 55 Central Park South was clearly understood and acknowledged by Liberty to constitute a "cable system", as defined by applicable law and FCC regulation.*

*The further extension of this system from 10 West 66th Street to yet another building, the one -- 22 West 66th Street -- at issue in this proceeding, does not nullify its being a "cable system", clearly serving "subscribers" at 55 Central Park South. Thus, Liberty's argument that it has no subscribers at 22 West 66th Street is essentially rendered moot.*

*Liberty's silence on this important point, its failure to indicate in its response the significant fact that 10 West 66th Street was already hardwired to 55 Central Park South, where subscribers were being served, manifests, frankly, a lack of forthrightness that the Commission finds disturbing.*

*Notwithstanding this, when considered on its own merits, as analyzed at length in the pages that follow, Liberty's assertion that it has "no subscribers" at 22 West 66th Street does not remove its action from the scope of the Commission's standstill order.*

*Liberty's interconnection is clearly in violation of the standstill order, and the Commission herein is ordering Liberty to cease and desist service to 22 West 66th Street.*

*As indicated above, Liberty acknowledged almost a year ago that the system operating at 10 West 66th Street was a "cable system" (by reason of its admitted wired interconnection with 55 Central Park South). Not being a franchised cable operator, of course, such interconnection by Liberty was illegal. Nonetheless, this Commission did not foreclose the continuation of service to such building(s) but ordered that, for the time being, Liberty refrain from making any additional illegal connections. And the Commission's standstill order, despite Liberty's legal challenge, has remained in effect.*

*Liberty's overt actions in this matter, coupled with its lack of candor about important underlying facts, manifest a disrespect for this regulatory agency, the Federal Communications Commission, the judiciary, and the law itself — a disrespect of a kind which this Commission, frankly, has never previously encountered. To allow Liberty to continue to prosper from its violation would be to invite a diminishment of esteem for this agency and the regulatory process, and to abide an erosion of the integrity so essential to the Commission's functioning.*

*As to what forfeitures, if any, are appropriate, the Commission herein is also directing its counsel to take such actions as are necessary to determine whether ameliorating circumstances exist in this matter, and to make a recommendation to the Commission regarding appropriate forfeitures.*

*In rationalizing its actions, Liberty cites the fact that one of the purposes of the Cable Act was to promote competition. Indeed, the 1992 amendments to the Cable Act contained numerous provisions intended to promote competition. What Liberty fails to accept is the fact that Congress opted not to exempt Liberty's "non-common" configuration from being a "cable system" and did not endorse the wholesale-retail concept asserted herein.*

*Liberty's insistence that competition will be served if it is permitted to provide cable service indiscriminately to buildings, as long as public property is not used, is superficially appealing. Upon closer examination, however, the bulk billing contracts with landlords do not provide enriched "consumer choice" for individual subscribers; rather, the benefits of the competition here inure mainly to the landlords.*

*In terms of the public interest, the adoption of Liberty's position would be antithetical to an enlightened telecommunications policy if the consequence of such would be to establish landlords and condominium boards as "telecommunications gatekeepers" deciding who will be permitted to distribute information by wire in the major urban areas of the country.*